Supreme Court of the United States.

JOHN Q. BROWN, ASSIGNEE &C., PLAINTIFF IN ERROR,

vs.

THE MARION NATIONAL BANK, OF LEBANON, KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Plaintiff in Error, as assignee for the benefit of creditors of Lafayette and E. B. Baxter, together with his assignors, instuted this suit against Defendant in Error, under the second clause of the 30th section of the Act of Congress of June 3, 1864, known as the National Bank Act, to recover the penalty of twice the amount of usurious interest paid to Defendant in Error.

In the same suit it was alleged that Plaintiff in Error had instituted in the Marion Circuit Court, an action for the settlement of his trust as assignee, for an ascertainment of creditors and for distribution of the assets in his hands: that Defendant in Error was asserting against those assets four separate claims, evidenced by notes for $4,500, $1,225, $430 and $650 respectively; that each note, in its face, carried with it a large amount of usurious interest, each being the last of a series of renewal notes, on which interest had not been paid, but carried forward and and included in the face of the new notes.

A consolidation of the two actions was asked, and an order enjoining Defendant in Error from collecting or demanding any interest on the amount of the several original

loans. The Circuit Court consolidated the actions and decreed that each of the four notes should be presented and proven against the estate of the Baxters in the hands of their assignee for the full amount of its face, forfeiting only such interest as had accrued on the face of each note, after maturity, at 7 per cent. per annum.

This portion of the decree was, on appeal, approved by the Appellate Court, and the case remanded for further proceedings; after which, on another appeal, the final judgment of the Circuit Court was affirmed by the Court of Appeals. From that decision of the Court of Appeals of Kentucky, this Writ of Error is prosecuted, and Plaintiff in Error assigns the following

SPECIFICATIONS OF ERROR.

1. The Court of Appeals of Kentucky erred in holding that the forfeiture of interest provided for in Sections 5197-98, U. S. Revised Statutes, does not apply to usurious interest accrued upon a series of notes, each a renewal of another, and all given as evidence of the same loan, where the interest has been included in the face of the existing note, but never paid.

2. The Court erred in permitting Defendant in Error to recover the amount of the face of each of its four notes against the estate of Lafayette and E. B. Baxter, when the face of each note included usurious interest calculated in advance to the date of its maturity, and also included usurious interest brought forward from other notes, of which the notes in suit were renewals, and given to secure the same loan.

3. The Court erred in deciding that usurious interest is a valid consideration for a promissory note, and that a court of equity should enforce payment to the full amount of its face.

ARGUMENT.

While the Act of Congress referred to (Revised Stats. Sec. 5197—98) is penal in its nature, it is also a remedial statute, and should be liberally construed to effect the ob-

ject of its enactment. *1 Blackstone 88, Potter's Dwarris, 260, Farmers' National Bank vs. Deering, 91 U. S. 35.*

The provisions of the statute may be enforced in the State Courts, and the form of proceedure will be regulated by the local rules of practice. *Bank vs. Deering. Supra. Bletz vs. Columbia National Bank, 30 Am. Rep. 343.*

While the rate of interest allowable is fixed by the State law (in Kentucky, 6 per cent. per annum.), the consequences of an excessive charge by a National Bank are not affected by local usury laws, but by the Act of Congress that is operative alike in every State. *Barnet vs National Bank,* 98 U. S. 555.

It has been the settled policy of our Government, State and National, to prevent an exhorbitant interest or profit for the use of money loaned. Usury, according to Mr. Tyler, in his work on the subject, (page 35) is "the taking "of more for the use of money than the law allows," and it is a familiar principle, universally applied in the construction of laws against usury, that any device resorted to for the purpose of evading them and obtaining more than the legal rate of interest on a loan, will be closely scrutinized, the intent of the parties ascertained, and the laws against usury applied. A sale of bank stock, of land, or of personal property, a sale or exchange of securities, or any other device to cover up a usurious transaction, will be probed, and the Statute applied when the circumstances are such as to induce the belief that the particular form of transaction was designed to evade the Statute. The general rule is that, as between the original parties, where a security is affected with usury, any other security substituted therefor, is likewise affected. *Davis vs. Garr, 55 Am. Dec. 397 and note.* This is the settled rule in Kentucky in applying the State laws against usury, (*Rudd vs. Planters' Bank, 78, Ky. 513*), but the Court of Appeals in this case declined to recognize the rule as applicable to the National Bank Act. That it should be applied in cases arising under that Act, and that the decision in this case was wrong

in principle, was expressly recognized by the Court of Appeals in a subsequent case, (*Sydner vs. Mt. Sterling National Bank, 94, Ky. 231*), in which the Court said, quoting from *Farmers' and Mechanic's Bank, of Mercer vs. Hoagland, U. S. Circuit Court, 7 Fed. Rep., 161*: "By the "terms of the Act of Congress the charging of such rates "of interest (in excess of the legal rate) worked a for- "feiture of the entire interest which the several notes car- "ried with them. Now such forfeiture was not waived by "the giving of subsequent notes, although, as respects "them, the agreed rate of interest was a legal rate. They "were mere renewals, and given without any new consid- "eration. Nor, did the new notes operate as payment of "the debts for which they were given. In so far, then, as "the notes in suit embrace the forfeited interest, they are "without consideration. Moreover, it is an established "principle that if there be usury in the original transac- "tion, it affects all consecutive securities, however remote, "growing out of it; and neither the renewal of an old, "nor the substitution of a new security, between the same "parties, can efface the usury. The bank incorporated in "the new notes usurious interest, previously charged, as a "part of the new principal, and this illegal consideration "pervaded the whole subsequent series of notes. Upon "each fresh renewal interest was charged upon usurious "interest, which had entered into the prior notes as princi- "pal."

It is unfortunate for Plaintiff in Error that our Court of Appeals declared the correct rule too late to remedy the injustice of its former decision in this case. We can only hope that this Court will apply to this case the rule now recognized by the Kentucky Court of Appeals as the only correct one. This Court has declared the same rule in the case of *McBroom vs. Scottish Mortgage and Land Investment Co. 153 U. S. 328—9*, in which is cited with approval the opinion of the District Court for the Western District of Pennsylvania, in *Duncan vs. First National Bank of Mt.*

Pleasant: "From the origin of the loan, from the retaining of the first discount, through all the renewals, up to "the time of final payment of the principal, or up to the "time of entering judgment, there is a *locus penitentiæ* for "the party taking the excessive interest. Any time till "then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. When payment is actually made, or judgment entered, the election is made, and if, as in this case, judgment is entered for the face of the notes, or full amount "of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause "of action is complete."

That including the excessive interest in the face of the note will not enable the holder to evade the forfeiture of the entire interest on the sum loaned, under the National Bank Act, had been long since decided in the case of *Bank vs. Deering*, *91 U. S. 29*.

In *Barnet vs. National Bank*, 98 *U. S.* 555, the Circuit Court for the Southern District of Ohio had overruled a demurrer to the de ense, "that the bill in suit was the last "of eight renewals; that illegal interest was taken upon "the series to the amount of $1,116.00, which it was "claimed should be applied as a payment upon the bill in "question." A demurrer had been sustained to two other defenses on the ground that each alleged actual payment of the usurious interest. The judgment was affirmed, this Court saying: "Two categories are thus defined and "the consequences denounced:

"1. Where illegal interest has been knowingly stipulated for but not paid, there only the sum lent, without "interest, can be recovered.

"2. Where such illegal interest has been *paid*, then "twice the amount so paid can be recovered, etc., etc."

If not actually paid, the Court will not compel its payment, whether it be promised, as interest, by name, or be included in the face of a series of renewal notes. Usury,

the collection of which is forbidden by law, and subjects the receiver to a penalty of twice the amount, can not be a valid consideration for a note or promise to pay it; to the extent of the usury the promise is void, and only the sum originally loaned may be recovered, less the amounts of the several payments on the *debt*. The debtor may, if he elect, actually pay the usurious interest, but the law will not apply, or permit the creditor to apply, a payment, made generally, to the satisfaction of usurious or illegal interest, rather than to the part of the note founded upon a valid consideration. After such general payment the creditor could not be subjected to the penalty of twice the amount, as for usury paid, for, until the whole sum lent is paid, or judgment taken for it disregarding the payments, he still has a *locus penitentiæ*, as said in the McBroom case, supra. In *Driesback vs. National Bank*, 104 U. S. 52, which was a suit on the last of a series of renewals, it appeared that at each renewal the interest had been actually paid. The decision in the Barnet case was reaffirmed, Chief Justice Waite saying: "The claim is not "for interest stipulated for and included in the note sued "on, but for the application of what has actually been *paid as interest*"

If, however, there had been a payment on a note, of which part of the consideration is good, as for the original loan, and part bad as for usurious interest, the payment will not be of interest *as interest*, but will be applied to that part of the note supported by a valid consideration.

It would seem that on principle and authority the decision of the Kentucky Court of Appeals in this case should be reversed, and the rule applied as now recognized by that Court in the case of *Sydner vs. Mt. Sterling National Bank, supra*. Defendant in Error should be permitted to prove against the assigned estate only the amount of its several original loans, less the payments that were, from time to time, made, not as payments of interest, but as payments on the debts.

Respectfully submitted.

H. W. RIVES,
For Plaintiff in Error.

E. J. McDERMOTT,
Of Counsel.